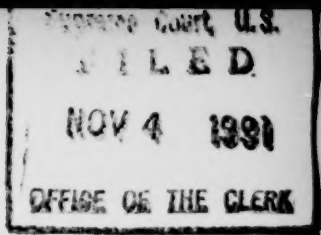


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91-739



No. _____

IN THE
Supreme Court of the United States
October Term, 1991

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

PHYLLIS STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Whether the Eighth Circuit Court of Appeals was wrong in finding that an Arkansas Endorsement of Public Liability and Property Damage was included in the insurance coverage provided L. P. Head by Liberty Mutual Insurance Company, nullifying the defenses of Liberty Mutual Insurance Company under the policy.

2. Whether an Arkansas Endorsement can be read into a policy written in Tennessee.

3. Whether the conflict of same with federal regulations constitutes an undue burden on interstate commerce.

PARTIES TO THE PROCEEDING

Petitioner Liberty Mutual Insurance Company is a corporation writing liability insurance.

Respondent Phyllis States is the personal representative of the estate of her deceased husband, Randall W. States.

Respondent Harvey Hughes was the driver of a motor vehicle carrier and was employed by L. P. Head.

Respondent L. P. Head was a contract carrier by motor vehicle of livestock.

Respondent Elgin Warehouse and Equipment owned the tractor trailer being driven by Randall W. States at the time of his death.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *Liberty Mutual Insurance Company v. Phyllis States*, 940 F.2d 1179 (8th Cir. 1991).

The opinion of the District Court is *Liberty Mutual Insurance Company v. Harvey Hughes, L. P. Head and Phyllis States*, Memorandum Opinion and Judgment of U. S. District Court, Eastern District of Arkansas, entered July 2, 1990 (Decision not reported).

JURISDICTION

Judgment of the U. S. Court of Appeals for the Eighth Circuit was entered August 5, 1991. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. §1254(1).

This petition for writ of certiorari should be granted to review the state question of law decided by the United States Court of Appeals for the Eighth Circuit. If Arkansas law is as the Eighth Circuit holds, it constitutes an undue burden on interstate commerce. Article 1, Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article 1, Constitution of the United States, Section 8(3):

The Congress shall have the power . . . to regulate commerce . . . among the several states.

49 U.S.C.A. §10526(a)(6)(A):

The Interstate Commerce Commission does not have jurisdiction under this subchapter over transportation by motor vehicle of ordinary livestock.

49 U.S.C.A. §§101 and 102:

Text appears in the appendix.

49 C.F.R. §387.1, .3(a), .5, .7 and .15

Text appears in the appendix.

Arkansas Motor Carrier Act of 1955 (A.C.A. §§23-13-203, 207, 208 and 227:

Text appears in the appendix.

Rule 13.1, Arkansas Transportation Commission:

Text appears in the appendix.

STATEMENT OF THE CASE

Liberty Mutual Insurance Company brought this case for declaratory judgment based on diversity of citizenship.

In 1984, L. P. Head hauled livestock interstate for A. W. Cherry & Sons. Head owned three trailers and, under a rental agreement with Saunders Leasing Company, Inc., rented tandem-axle tractors to pull the trailers. Head's rental agreements with Saunders from time to time were quite similar to renting a Hertz or Avis automobile. Saunders had an insurance contract with Liberty Mutual by which Saunders made insurance available to renters who chose not to provide their own. The full terms of the rental agreement and what insurance coverage, if any, was purchased by the renter all was set out in a two-page contract. The rental agreement contained provisions requiring the renter immediately to report any accident and any litigation. The renter agreed to cooperate fully with Saunders or its insurance company in the handling of any claim. On October 18, 1984, Saunders and an L. P. Head employee executed such a two-page agreement. The following day, Randall States died in a highway accident near Forrest City, Arkansas. The accident allegedly occurred when a spare tire was reported to have fallen from an L. P. Head trailer being towed by a Saunders tractor driven by Harvey Hughes, who had rented the trailer for Head the previous day, and bounded into the path of Randall States and his vehicle.

Phyllis States, personal representative of the estate of her dead husband, Randall States, brought suit for damages in federal district court against Saunders Leasing Company, Inc., L. P. Head and Harvey Hughes. Liberty Mutual Insurance Company contended that Head did not furnish the cooperation required under the insurance provisions of the rental contract. Head and Hughes filed no answer, and a default was entered against them October 5, 1987. Liberty Mutual brought this original action for declaratory judgment in the federal district court to determine whether it was obligated under the terms of its insurance coverage to pay any damages awarded against Head or Hughes or to defend them in any actions. The U. S. District Court at Little Rock found that neither federal law nor Arkansas law mandated insurance coverage for Head and Hughes and that Liberty Mutual was entitled to deny insurance coverage because of lack of notice and non-cooperation. The court found Liberty Mutual was not obligated to pay any judgment entered against Head. The Eighth Circuit Court of Appeals reversed and remanded the case to the District Court to fix damages. The Court of Appeals, citing a "Uniform Motor Carrier Bodily Injury and Property Damage Liability Insurance Endorsement" which was a part of the gross contract between Liberty Mutual and Saunders Leasing, found that Arkansas law prevented Liberty Mutual from denying liability insurance coverage to L. P. Head.

REASONS FOR GRANTING THE PETITION

Petitioner contends the Eighth Circuit Court misconstrued Arkansas statutory and case law in reaching its decision. The judgment of the District Court should have been upheld.

L. P. Head ("Head") hauled cattle for A. W. Cherry & Sons of Lebanon, Tennessee. Head owned three cattle trailers which were 46 feet long and had eight wheels.

Saunders Leasing Systems, Inc. ("Saunders") was a Delaware corporation whose principal place of business and corporate headquarters was in Birmingham, Alabama. Saunders was in the business of renting and leasing trucks. Saunders did not transport people or property for hire.

On October 18, 1984, one of Head's drivers, Harvey Hughes, signed page 2 of a rental agreement for approximately one week's rental of a truck from Saunders. This rental agreement set out the rights and duties of the parties with respect to the rented truck. The rental agreement allowed the renter to choose whether to purchase insurance coverage through Saunders or to provide it himself. For those renters such as Head who chose to purchase insurance through Saunders, a renter's policy was in effect with Liberty Mutual Insurance Company. The rental agreement itself set out the provisions of the insurance policy in paragraph 5 of page 1 of the rental

contract which entirely was on the front and back of one sheet of paper. Paragraph 5 of the contract provides in part that:

... Renter shall be subject to all terms and conditions of said policy, however, regardless of the provisions of said policy, the limits of the insurance extended to renter by owner shall not exceed \$250,000 for injury to or death of each Third Person in one accident, and subject to that limit for each such person a total liability of \$500,000 for all persons injured or killed in the same accident, and shall have a limit of \$100,000 for damage, destruction and/or loss of use of property of third persons as a result of any one accident. ...

Paragraph 5 of the rental contract also required the renter immediately to report all accidents, immediately to deliver any and all papers received by lessee to the facility where the vehicle was rented or to the insurance carrier, and fully to cooperate with Saunders and/or the insurance carrier in the investigation and defense of any claim. This was the only insurance provided by Liberty Mutual through Saunders to Head. The premium paid by Head was for this insurance only. No endorsements were asked for, no endorsements were paid for, and no endorsements were included.

The Eighth Circuit found that under Arkansas law, Liberty Mutual Insurance Company was obligated to pay any final judgment rendered against its

insured, Head. It did not address the federal issues, since it found that the state law was dispositive. However, Arkansas state law is so closely analogous to the federal law that both must be discussed.

The Arkansas Motor Carrier Act of 1955 is codified at Arkansas Code Annotated §§23-13-201 *et seq.* A.C.A. §23-13-205 is entitled "Interstate Commerce Unaffected by Subchapter."

Nothing in this subchapter shall be construed to interfere with the exercise by agencies of the government of the United States of its power of regulation of interstate commerce.

Furthermore, A.C.A. §23-13-227 which tracks the federal regulations requiring insurance coverage and policy endorsements under subsection (c) thereof provides that the rules and regulations of the Arkansas Transportation Commission "... shall conform as nearly as may be consistent with the public interest to those rules made by the Interstate Commerce Commission. . . ." Clearly the legislative intent was that the Arkansas regulations track the federal regulations, which they have done.

"The relevant provisions of the Arkansas Code are obviously patterned after the federal statutes, the Interstate Motor Carriers Act of 1935, as amended, 49 U.S.C.A. §301 *et seq.*, as the Arkansas legislation and the federal legislation are almost identical . . . the latest amendments in both (the state and federal) statutory

schemes continue to carry similar definitions and standards of proof.” *Transport Company, Inc. v. Champion Transport, Inc.*, 298 Ark. 178, 766 S.W.2d 16, 19 (1989).

The Arkansas Motor Carrier Act created the Arkansas Transportation Commission, which regulates common and contract motor carriers. A.C.A. §23-13-207. Likewise, the federal Department of Transportation was established by Congress. 49 U.S.C.A. §101 and §102. Head, as a transporter of ordinary livestock, was not subject to the Interstate Commerce Commission. 49 U.S.C.A. §10526(a)(6)(A). However, Head fit the definitions of a “motor carrier” and the more strict definition of a “contract carrier by motor vehicle,” both under Arkansas law and federal law, A.C.A. §23-13-203(8)(9), 49 Code of Federal Regulations (C.F.R.) §387.5, and therefore was subject to the rules and regulations prescribed by both the Arkansas Transportation Commission and the federal Department of Transportation. Neither Saunders Leasing Company nor Liberty Mutual Insurance Company was any type of carrier by any definition. Therefore, neither was subject to any transportation rules or regulations of either Arkansas or the United States. Because the transportation rules and regulations of both Arkansas and the United States are nearly identical, the federal regulations will be discussed first, followed by the state rules.

Article 1, section 8 of the United States Constitution gives the Congress the power to regulate interstate commerce. Pursuant to that power, the

Department of Transportation was created. Its regulations are set forth in the Code of Federal Regulations. 49 C.F.R. §387 is entitled "Minimum Levels of Financial Responsibility for Motor Carriers." It applies only to "for hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce. 49 C.F.R. §387.3(a). This part further provides that:

... no motor carrier shall operate a motor vehicle until the **motor carrier** has obtained and has in effect the minimum levels of financial responsibility as set forth in Section 387.9 of this part. Policies of insurance, surety bonds, and **endorsements** required under this section shall remain in affect continuously until terminated.

49 C.F.R. §387.7

Endorsements are defined under 49 C.F.R. §387.5 as "an amendment to an insurance policy." 49 C.F.R. §387.7 further requires that "proof of the required financial responsibility shall be maintained at the **motor carrier's** principal place of business. The proof shall consist of 'endorsement(s) for motor carrier policies of insurance for public liability under Sections 29 and 30 of the Motor Carrier Act of 1980' (Form MCS-90) issued by an insurer." The regulations then go on to give an illustration of the form MCS-90 in 49 C.F.R. §387.15. Pertinent language contained in the MCS-90 form of endorsement is as follows:

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to

pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980. . . . It is understood and agreed that no condition, provision, stipulation or limitation contained in the policy, **this endorsement**, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment within the limits of liability herein described. . . . [Emphasis is supplied.]

Thus, it can be seen that the negation of the defenses to coverage of the insurance policy are only contained in the endorsement from MCS-90, and therefore are only negated when such endorsement has been purchased by the carrier. This opens up the insurance provider to much more liability than it would have had under a basic policy. That is why it is in the form of an endorsement which has to be asked for and paid for by the motor carrier. 49 C.F.R. §387.15 requires that the endorsement be issued in the exact name of the motor carrier, and the MCS-90 form itself states that it is "the motor carrier's obligation to obtain the required limits of financial responsibility."

The agency decision adopting the form MCS-90 for use by the Department of Transportation had this to say about the language and why it was the motor carrier's duty to get the required coverage in motor carri-

er cases:

The adoption of the form MCS-90 endorsement resolves many of the objections raised by the organizations responding to the notice of proposed rule making. Aetna, the National Association of Casualty and Surety Agents, the National Association of Insurance Brokers, Inc., and the Professional Insurance Agents want language placed in the regulations which would place the responsibility for maintaining the proper insurance levels on the motor carrier, and not on the insurance company. Motor Carrier Cases, Interstate Commerce Commission, Ex Parte No. MC-5 (SUB. No. 1) 948 at page 953.

It was clearly a concern of the various insurers of motor carriers that they know to whom they were obligated and to what extent. At page 950 of the opinion cited above the names of 16 entities (most of them insurance companies) are listed as having filed statements with the Commission regarding this concern and "particularly with regard to the insurance companies' financial exposure when insuring for hire interstate motor carriers or property." At the trial in the District Court at Little Rock, the defendant States' own expert witness, Kenneth Pierson, testified to the above facts.

Mr. Pierson further testified as follows:

Q. Mr. Pierson, with regard to the insurance policy issued to Saunders' carriers by

Liberty Mutual and you say you have examined that policy in detail, was there an MCS-90 endorsement in that policy issued to L. P. Head.

A. There was not.

Q. Now, you have testified that through your expertise and understanding of the regulations, particularly within reference to the C.F.R. 49 and C.F.R. §387 regarding the financial responsibility requirements for motor carriers, would you tell the court who those regulations place the burden on in obtaining the MCS-90 endorsement?

A. The regulations apply to motor carriers, and it was specifically the government's intent not to regulate insurance companies. . . .

Q. All right, who is the motor carrier in this case?

A. The motor carrier is L. P. Head.

Q. Okay, is Saunders Leasing, Inc. a motor carrier under the rules and regulations of the DOT? They are not, are they?

A. They may be, I don't believe they are. . . .

Q. Saunders is not subject to the Department of Transportation's financial responsibility requirements, are they?

A. They are not.

Q. L. P. Head is the only one in this case responsible for that, isn't he?

A. That is correct.

Q. All right, and it's his duty, it's L. P. Head's duty, the motor carrier's duty, to get that endorsement, isn't it?

A. Yes, it is.

....

Q. I don't want to belabor the point too much, Mr. Pierson, but would you not admit that it's L. P. Head's duty, not Saunders' duty and not Liberty Mutual's duty, to see that he had an MCS-90 endorsement attached to his policy of insurance that he was issued an MCS-90 endorsement?

A. Actually, [he] had two duties: One was to obtain the financial responsibility; and secondly, to obtain the endorsement evidencing it.

Q. You have looked at the policy of insurance which was issued to Saunders in this case, have you not?

A. Yes, I have.

Q. Is there an MCS-90 endorsement in that policy which has been issued to L. P. Head?

A. There is not.

.....

Q. Well, you have just stated a moment ago that it was his duty to see that he got the proper coverage?

A. Yes.

Q. To see that he got an MCS-90 endorsement?

A. Yes.

Q. Now, you also stated it was not Saunders' duty to see that he got that?

A. That's correct.

Q. It's not Liberty Mutual's duty to see that he got one?

A. That's correct.

Q. It was L. P. Head's and L. P. Head's duty alone to see that he got the proper coverage, being a motor carrier subject to the jurisdiction of the Department of Transportation?

A. That's correct.

There was no MCS-90 form issued for L. P. Head. As has been shown, it was his duty, and his duty alone to obtain one. Neither Saunders Leasing nor Liberty Mutual was subject to the financial responsibility requirements of the Department of Transportation. Head as a motor carrier was the only one subject to those regulations. Defendant's

own expert witness testified that the insurance policy contained no MCS-90 endorsement. It was Head's duty to ask for and purchase such endorsement. Without such endorsement, Liberty Mutual's defenses of non-cooperation are not negated.

As has been stated, the statutes making up the Arkansas Motor Carrier Act, and the rules promulgated by the Arkansas Transportation Commission were intended to track the federal rules and regulations. This they do. If the rules of the Arkansas Transportation Commission are read as they have been by the Eighth Circuit Court of Appeals, they would go further than the federal rules and regulations and would be preempted as undue burden on interstate commerce.

The minimum insurance required under the rules of the Arkansas Transportation Commission are contained in its Rule 13.1, entitled "Public Liability and Property Damage Endorsement."

All carriers by motor vehicle are required to file public liability and property damage insurance or in lieu thereof, a certificate of insurance on the form approved by the Commission with minimum liability as set forth in the Arkansas Public Liability and Property Damage Endorsement which must be attached.

This was quoted correctly by the Eighth Circuit Court. However, the court went on to say that the "rule further provides that '[n]othing contained in the [insurance] poli-

cy or any endorsement thereon, nor the violation of any provisions by the assured, shall relieve the [insurance] company from . . . liability . . . or from the payment of [any] judgment." This is not part of the rule. It is language contained in the form of the Arkansas Endorsement for Property Damage and Personal Liability. This form, as in the federal rules, 49 C.F.R. §387.15, is given in the rule, but is not part of the rule. It is merely the form of the endorsement approved by the Commission, and is therefore set forth in the rule.

The duties required under the Arkansas rules are exactly the same as those under the federal rules and regulations. It is the **motor carrier's** duty to obtain the required endorsement, no one else's. There was no evidence that Saunders Leasing or Liberty Mutual Insurance Company was a motor carrier. In fact, Kenneth Pier-son, the expert witness for the defendant, stated that they were not. L. P. Head was the only motor carrier involved, and was the only one who had a duty to obtain the re-quired endorsement.

Just as there was no MCS-90 endorsement for Head, neither was there an Arkansas endorsement. Mr. Leilson Wilson, claims manager for Liberty Mutual Insurance Company in Little Rock, Arkansas, testified as to the policy purchased by Head. He testified that the provisions of the policy purchased by Head were con-tained in Paragraph 5 of page 1 of the rental agreement. Paragraph 5 provides:

(The provisions of this Paragraph 5 shall apply only in the event OWNER by endorsement on Page 2 hereof agrees to provide public liability and property damage insurance and RENTER PAYS A FEE FOR SUCH COVERAGE.)

OWNER maintains in full force at its expense an automobile bodily injury and property damage insurance policy insuring both OWNER and RENTER, and their respective agents, servants, and employees from any and all liabilities for injuries to the property or person, including death, of Third Persons resulting from the ownership, use, operation, or maintenance of the Vehicle. Third Persons for the purposes of this policy shall not include without limitation, the drivers, agents, servants, employees, partners, officers or directors of RENTER nor shall it include members of RENTER'S family, nor any other occupants or passenger, whether riding in or alighting to or from the Vehicles. RENTER shall be subject to all of the terms and conditions of said policy however regardless of the provision of said policy, the limits of the insurance extended to RENTER by OWNER shall not exceed \$250,000 for injury to or death of each Third Person in any one accident, and subject to that limit for each such person, a total liability of \$500,000 for all persons injured or killed in the same accident, and shall have a limit of \$100,000 for damage, destruction and/or loss of use of property of Third Persons as a result of any accident.

It is further agreed and understood

between the parties that such insurance provided by OWNER does not extend coverage to property owned by or in the possession of RENTER or its agents, including cargo. Every accident must be immediately reported in writing to OWNER at the facility from which the Vehicle was rented. RENTER or driver must immediately deliver to such facility or to the insurance carrier any claim, demand, process, pleading, or paper of any kind relating to any accident or claim for which OWNER provides liability insurance coverage. RENTER further agrees to cooperate fully with OWNER and/or insurance carrier in all matters connected with the investigation and defense of any claim, suit, or proceeding.

It is agreed and understood that compliance with the terms, conditions, restrictions and/or prohibitions of this Agreement is a condition precedent to any insurance coverage the OWNER has agreed to provide. Subject to applicable state law, such insurance coverage may be revoked upon the breach of any term, condition, restriction and/or prohibition contained in the Agreement without notice to the RENTER.

As can be seen, the policy purchased by Head contained provisions for revocation upon the breach of the terms, conditions and restrictions of the policy, one of which was non-cooperation. There was no Arkansas endorsement attached to this policy. Head did not ask for one, did not pay the premium for one, and was not provided with one.

Mr. Wilson was also questioned at the trial concerning a rather large policy that was made Joint Exhibit #1 to the trial. He testified that this was the general policy issued to Saunders Leasing, and not the policy given to or purchased by Head. This policy contained examples of coverages and endorsements that could be obtained. It contained, for example, an MCS-90 endorsement sold to a company called Bangor-Punta, and a blank BMC-90 endorsement, which is a form much like the MCS-90 but used by the Interstate Commerce Commission rather than the Department of Transportation. There was some question about a form included in the Saunders policy entitled "Uniform Motor Carrier Bodily Injury and Property Damage Liability Insurance Endorsement." This form contained among other things a list of the 50 states with "x" beside certain states, including Arkansas. It was contended by defendant that this was in fact the required Arkansas endorsement. This is not correct. Leilson Wilson testified that this form was placed in Saunders' policy to show them where the endorsement forms would be and should be filed if requested. It was not countersigned, nor was it issued to anyone. This was not an Arkansas endorsement. It did not contain the language, nor was it in the form required under Rule 13.1 of the rules of the Arkansas Transportation Commission. It was Head's responsibility as the motor carrier to ask for and purchase an Arkansas endorsement. This he did not do, and therefore Liberty Mutual's defense of non-cooperation was not negated.

The Eighth Circuit Court of Appeals fur-

ther held that even if the required Arkansas endorsement was not issued, insurance contracts in Arkansas are read to include it.

Certain federal and state court rulings were cited to support the statement that insurance contracts in Arkansas are read to include applicable statutory and public policy provisions in effect at the time the insurance policy is issued. These cases are a correct statement of Arkansas law; however, it should not apply to the circumstances of this case for two reasons. First, the rule concerning the law was misconstrued; and second, the insurance policy was not obtained in Arkansas, and therefore not subject to Arkansas law.

Arkansas Transportation Commission Rule 13.1 is the “applicable statutory and public policy provisions in effect at the time the insurance policy is issued” relied on by the Eighth Circuit to negate the defense of non-cooperation. This rule is almost identical to the Department of Transportation rules. 49 C.F.R. §387.7 and §387.15. Both state that motor carriers, in this case Head, are required to obtain public liability and property damage endorsements which nullify the policy defenses. Both rules then go on to give an example of a form to be used, the federal form MCS-90 endorsement and the Arkansas Property Damage and Personal Liability endorsement. This part of Rule 13.1 is quoted by the Eighth Circuit. However, the court went on to say that this rule “further provides that ‘[n]othing contained in the [insurance] policy or any endorsement thereon, nor the viola-

tion of any of the provisions by the assured, shall relieve the [insurance] company from . . . liability . . . or from the payment of any [judgment].’ ” This part was incorrectly construed to be part of Rule 13.1. However, it actually is language from the sample form given under Rule 13.1, and not actually a part of the rule. The federal law is somewhat clearer in that preceding its sample form the term “Illustration” is placed above it. It is clear that this language quoted by the Eighth Circuit is merely part of the form coming under the heading “Arkansas Endorsement.” Looking at the rule as a whole will bear out this reading.

The second problem with the Eighth Circuit holding is the most significant. The insurance policy in question was not issued in Arkansas. It was issued in Tennessee, and therefore not subject to the inclusion of any applicable Arkansas statutory or public policy provisions.

L. P. Head rented the tractor truck from Saunders Leasing in Nashville, Tennessee. He bought and paid for an insurance policy provided through Saunders Leasing by Liberty Mutual Insurance Company. He did not ask for an MCS-90 endorsement or an Arkansas endorsement. There was no evidence presented that either Saunders Leasing or Liberty Mutual knew that L. P. Head would be hauling in Arkansas. Not being subject to the Department of Transportation regulations or the Arkansas Transportation Commission regulations, Saunders and Liberty Mutual had no duty to provide any such en-

dorsement absent a request and payment of premium from Head. The responsibility for obtaining the necessary insurance coverage belonged to the motor carrier, in this case, L. P. Head. Arkansas law cannot give an insured coverage which he did not request nor pay for merely by his driving across a state line. This may be shown by way of this analogy:

A driver buys insurance in Tennessee; assumed that Tennessee has no law requiring uninsured motorist coverage. Since this coverage was not required in Tennessee the driver chose not to purchase it. If while later driving in Arkansas the driver is involved in an accident with an uninsured motorist, it would be ridiculous for him to request that his insurance company cover this accident when he did not request nor pay for such coverage, merely because it is required by law in Arkansas insurance contracts.

L. P. Head did not request this endorsement. Neither Saunders Leasing nor Liberty Mutual Insurance Company had knowledge of L. P. Head's intent to drive in Arkansas. While Arkansas insurance contracts are read to include applicable statutory and public policy provisions, out-of-state insurance contracts, such as the one here, are not. Moreover, it was L. P. Head's duty to determine what insurance coverage he actually had. *Continental Casualty Co. v. Didier*, 301 Ark. 159, 783 S.W.2d 29 (1990). Since no endorsement was asked for or provided, and since none can be read into an out-of-state insurance contract, Liberty Mutual Insurance Company's

policy defense of non-cooperation is valid and not nullified.

The District Court correctly found that Head clearly breached the cooperation clause of the rental agreement and insurance policy. The District Court found that Liberty Mutual obviously was prejudiced by Head's failure to cooperate and that such acts "have been held to release an insurer from liability for damages under the policy which would have otherwise been covered," citing *Nationwide Mutual Fire Ins. Co. v. Dunkin*, 850 F.2d 441 (8th Cir. 1988). Because of this the District Court correctly found that Liberty Mutual Insurance Company had no liability to Phyllis States for any damages or loss arising from any traffic accident involving the vehicle owned or operated by L. P. Head.

Conclusion

If the Eighth Circuit's decision in this case stands, its interpretation will cause Arkansas law severely to interfere with the power of the United States government to regulate interstate commerce. It also will construe Arkansas law to defeat its own purpose stated in A.C.A. §23-13-205 not "... to interfere with the exercise by agencies of the government of the United States of its power of regulation of interstate commerce," also in violation of the Constitution of the United States in Article 1, Section 8(e).

It also will cause insurance companies in the future to flee from states where their policies may be

construed far beyond the financial responsibility that they thought they were accepting. This goes against the Department of Transportation agency decision adopting the form MCS-90 mentioned earlier. At the outset, insurance companies were successful in getting the Department of Transportation to rule that the duty of getting required insurance coverage in motor carrier cases was solely that of the motor carrier and not that of the insurance company.

It is common knowledge that Arkansas and many states have "weigh stations" at every major highway entering the state. In addition to determining whether a trailer is overloaded, they normally determine if the motor carrier has the proper insurance coverage. This has and will continue to protect the public against interstate motor carriers.

There was no evidence in the trial of this case that any endorsement MCS-90 or Arkansas Endorsement were ever asked for or given when this coverage was purchased in another state.

Respectfully submitted,
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OPINION OF THE COURT OF APPEALS

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 90-2207EA

LIBERTY MUTUAL INSURANCE CO.,

Appellee,

v.

PHYLLIS STATES,

Appellant.

**Appeal from the United States District
Court for the Eastern District of Arkansas.**

Submitted: March 15, 1991

Filed: August 5, 1991

**Before FAGG and LOKEN, Circuit Judges, HAMILTON,¹ Dis-
trict Judge.**

HAMILTON, District Judge.

In this declaratory judgment action based upon diversity of citizenship, Phyllis States appeals the judgment of the district court that Liberty Mutual Insurance Company (Liberty Mutual), the plaintiff below, is not liable for any losses or damages sustained in any traffic accident involving vehicles owned or operated by Har-

¹ The HONORABLE JEAN C. HAMILTON, United States District Judge for the Eastern District of Missouri, sitting by designation.

vey Hughes or L. P. Head. We reverse and remand.

In 1984, L. P. Head (Head) hauled livestock interstate for A. W. Cherry and Sons. He owned three trailers and, under a lease/rental agreement with Saunders Leasing System, Inc. (Saunders), leased tandem-axle tractors to pull the trailers.

Pursuant to the lease/rental agreement, Saunders provided liability insurance to Head under a business auto policy issued to Saunders by Liberty Mutual. Head was, under the terms of the lease/rental agreement, subject to all the terms and conditions of the Liberty Mutual policy and was insured up to certain monetary limits specified in the lease/rental agreement. In particular, Part VI A of the Liberty Mutual policy required the insured to notify Liberty Mutual promptly of any accident or loss and to cooperate with it in the investigation, settlement or defense of any claim or suit.

In addition, the lease/rental agreement contained the following provisions:

Every accident must be immediately reported in writing to OWNER [Saunders] at the facility from which the VEHICLE was rented. RENTER [Head] or driver must immediately delivery to such facility or to the insurance carrier any claim, demand, process, pleading or paper of any kind relating to any accident or claim for which OWNER provides liability insurance coverage. RENTER further agrees to cooperate fully with OWNER and/or

insurance carrier in all matters connected with the investigation and defense of any claim, suit, or proceeding.

Compliance with the terms, conditions, restrictions and/or prohibitions of the lease/rental agreement was a condition precedent to any insurance coverage and, subject to applicable state law, such coverage could be revoked upon breach of any such term, condition, restriction and/or prohibition without notice to Head.

On October 19, 1984, Randall States died in a highway accident near Forrest City, Arkansas. The accident allegedly occurred when a spare tire fell from an L. P. Head trailer being towed by a Saunders tractor that was driven by Harvey Hughes (Hughes), a Head employee. When his vehicle struck the tire, Randall States was killed.

Thereafter, Appellant Phyllis States, personal representative of the estate of Randall States, filed a suit for damages in federal district court against Saunders, Head and Hughes. Head was served on August 14, 1987. Head later testified by deposition that he mailed the suit papers to Saunders at its headquarters in Birmingham, Alabama. When Liberty Mutual became aware of the suit, it attempted without success to locate Head by telephone and by dispatching its adjuster to Head's business in Nashville and to his residence. It then hired an attorney to represent Head in the suit after a default had been entered against him on October 5, 1987.

On March 9, 1988, Liberty Mutual filed this declaratory judgment action in federal district court to determine whether it was obligated under the terms of its policy to pay any damages awarded against Hughes or Head or to defend them in any action brought as a result of the accident in which Randall States was killed.

On appeal Phyllis States contends the district court erred in its determination that Liberty Mutual has no obligation to defend or to pay damages as a result of the accident. She asserts that (1) under Arkansas law² and under federal law, the policy defenses relied upon by Liberty Mutual, that is, lack of notice and lack of cooperation by the insured, are inapplicable, and (2) in any event, the evidence fails to support those policy defenses.

The trial court's factual findings will not be set aside unless they are clearly erroneous. With respect to the first issue, we review de novo the trial court's legal conclusions regarding both federal and state law. *Salve Regina College v. Russell*, 111 S.Ct. 1217, 1221 (1991); *United States ex rel. Bussen Quarries, Inc. v. Thomas*, No. 90-2815EM, slip op. at 4 (8th Cir. July 9, 1991).

We disagree with the district court that Liberty Mutual has no liability under Arkansas law. The

² The pleadings in the record on appeal raise no issue of Arkansas law. The record reflects, however, that the issue was tried by implied consent of the parties. Fed. R. Civ. P. 15(b). *Pershern v. Fiatallis North America, Inc.*, 834 F.2d 136, 139 (8th Cir. 1987); *Karlen v. Ray E. Friedman & Co. Commodities*, 688 F.2d 1193, 1197 n. 3 (8th Cir. 1982); *Peterson v. Auto Wash Mfg. & Supply Co.*, 676 F.2d 949, 952 (8th Cir. 1982).

Arkansas Motor Carrier Act defines "motor carrier" as including "both a common carrier by motor vehicle and a contract carrier by motor vehicle, and any person performing for-hire transportation service without authority from the [Arkansas Transportation] Commission." Ark. Stat. Ann. §73-1758(a)(9) (1979) (current version at Ark. Code Ann. §23-13-203(a)(9) (1987)). A "common carrier by motor vehicle" is defined as "any person who or which undertakes, whether directly or indirectly, or by lease of equipment or franchise rights, or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public by motor vehicle for compensation whether over regular or irregular routes." *Id.* at §73-1758(a)(7). A "contract carrier by motor vehicle" is defined as follows:

[A]ny person not a common carrier included under Paragraph 7, Section 5 [this section] of this Act who or which, under individual contracts or agreements, and whether directly or indirectly or by lease of equipment or franchise rights, or any other arrangements, transports passengers or property by motor vehicle for compensation.

Id. at §73-1758(a)(8). A contract carrier devotes its efforts to a particular shipper or a very small number of shippers, which makes the carrier virtually a part of the shipper's organization. *Transport Co. v. Champion Transp., Inc.*, 298 Ark. 178, 766 S.W.2d 16, 19 (Ark. 1989).

Head, an interstate carrier of livestock,

hailed exclusively for A. W. Cherry and Sons. The trial court determined that Head "was something less than a 'common carrier by motor vehicle' " and so was not subject to Arkansas motor carrier law. Although we agree that Head was not a common carrier as defined in the Arkansas statute, we find that he qualified as a contract carrier and, as such, was subject to Arkansas motor carrier law.

The Arkansas Motor Carrier Act creates the Arkansas Transportation Commission which regulates common and contract motor carriers. Ark. Stat. Ann. §73-1756 (1979) (current version at Ark. Code Ann. §23-13-207 (1987)). These carriers must comply with the rules and regulations prescribed by the Commission.

Rule 13.1 of the Arkansas Transportation Commission requires "all carriers by motor vehicle . . . to file public liability and property damage insurance or in lieu thereof, a certificate of insurance on the form approved by the Commission with minimum liability as set out in the Arkansas Public Liability and Property Damage Endorsement which must be attached." That rule further provides that "[n]othing contained in the [insurance] policy or any endorsement thereon, nor the violation of any of the provisions by the assured, shall relieve the [insurance] company from . . . liability . . . or from the payment of [any] judgment."

The policy issued by Liberty Mutual included a Uniform Motor Carrier Bodily Injury and

Property Damage Liability Insurance Endorsement which, according to its terms,³ was filed with the state commission of Arkansas. The endorsement served as proof of financial responsibility and amended the attached policy to provide coverage in accordance with applicable state law.

Since Arkansas law states that nothing in the insurance policy may relieve the insurer of liability or payment of final judgment, the endorsement present in this policy nullified Liberty Mutual's defenses of lack of cooperation and lack of notice. Furthermore, since insurance contracts in Arkansas are read to include applicable statutory and public policy provisions in effect at the time the insurance policy is issued, the outcome would be the same even if the policy did not contain the endorsement. *Nichols v. Anderson*, 788 F.2d 1140, 1143 (5th Cir. 1986), *on appeal after remand*, 837 F.2d 1372 (5th Cir. 1988); *Carner v. Farmers Ins. Co. of Ark.*, 3 Ark. App. 201, 623 S.W.2d 859, 860 (Ark. Ct. App. 1981). Thus because its claimed defenses are unavailable under Arkansas law, Liberty Mutual is obligated to pay any final judgment rendered against its insured, Head.

3. That endorsement states in pertinent part:

1. The certification of the policy, as proof of financial responsibility under the provisions of any State motor carrier law or regulations promulgated by any State Commission having jurisdiction with respect thereto, amends the policy to provide insurance for automobile bodily injury and property damage liability in accordance with the provisions of such law or regulations to the extent of the coverage and limits of liability required thereby; provided only that the insured agrees to reimburse the company for any payment made by the company which is would not have been obligated to make under the terms of this policy except by reason of the obligation assumed in making such certification.

to the trial court for entry of judgment against Liberty Mutual on its Complaint for Declaratory Judgment and in favor of States on her counterclaim. Further, the trial court is ordered to determine the amount owed to Phyllis States by Liberty Mutual as a result of its insurance coverage of Head.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

OPINION OF THE DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

LIBERTY MUTUAL INSURANCE COMPANY

Plaintiff

v. No. H-C-88-20

HARVEY HUGHES AND L. P. HEAD,

PHYLLIS STATES, AS PERSONAL REPRESENTATIVE

OF RANDALL W. STATES, DECEASED AND ELGIN

WAREHOUSE AND EQUIPMENT

Defendants

Memorandum Opinion

This declaratory judgment action was tried to the Court on February 12, 1990. After a liberal briefing schedule, this matter is now ripe for adjudication. For the reasons set out herein, the Court finds that plaintiff, Liberty Mutual Insurance Company ("Liberty"), is not liable for any damages sustained by any defendant arising, either directly or indirectly, from the traffic accident which took the life of Randall W. States.

During 1984, defendant L. P. Head was engaged in the interstate transportation of cattle for A. W. Cherry and Sons. Pursuant to his arrangement with Cherry, Head transported cattle from the State of Tennessee to various other states as directed. Although Head owned three trailers which were used to haul the cattle, in 1984 he entered into an agreement ("rental agreement") with Saunders Leasing Systems, Inc. ("Saunders") for the lease of tractor trucks to pull the trailers. Saunders had

previously obtained a business auto policy of insurance from Liberty for liability insurance coverage on its vehicles. In conjunction with his leasing of the tractor trucks, Head purchased liability insurance with Liberty through Saunders.

On October 19, 1984, Randall W. States was killed in a motor vehicle accident near Forrest City, Arkansas. It is the contention of defendant Phyllis States ("States"), personal representative of Randall W. States, and defendant Elgin Warehouse and Equipment ("Elgin"), that the accident was caused by the falling of a spare tire into the path of Randall States' vehicle, owned by Elgin, from one of Head's trailers being towed by a Saunders tractor truck operated by an employee of defendant Head. In pending litigation related to this case, States and Elgin have advanced claims for the wrongful death of Randall States and the damages to the truck which he was driving, respectively, against Head, Saunders and defendant Harvey Hughes. On March 9, 1988, Liberty filed the instant action asking the Court to declare that it has no duty to defend Hughes and Head in any action arising from the accident involving Randall States and that it has no liability under the insurance mentioned to pay any part of any damages that might be awarded against Hughes or Head as a result of their role, if any, in the accident. Of the four named defendants herein, only States and Elgin have actively defended plaintiff's claims.

The parties are in agreement that Head was a motor contract carrier subject to the authority and regulations of the Department of Transportation ("DOT").

Pursuant to authority granted it by the Motor Carrier Act of 1980 (the "Act") and subsequent legislation codified in Title 49 of the United States Code, the DOT has promulgated rules and regulations which address practically every facet of interstate transportation. Of particular significance here, the DOT has established minimum levels of financial responsibility which "for hire" carriers must satisfy in the form of a qualified surety bond or insurance policy. 49 C.F.R. §387. Under §387.7(d), a motor carrier must maintain proof of his financial responsibility at his principal place of business and secure an endorsement, an MCS-90, to the surety bond or insurance policy as required by the Act. It is provided in 49 C.F.R. §387.15 that the endorsement should be issued in the exact name of the motor carrier and that it is "the MOTOR CARRIER'S obligation to obtain the required limits of financial responsibility."

The existence, or non-existence, of an MCS-90 in this case is of particular significance because of the specific provision therein precluding an insurer from asserting against the insured, or any third party injured by the insured, any defense under the policy which it could otherwise raise in response to a claim. The evidence plainly established that Head failed to obtain the MCS-90 endorsement required by law. States' own expert witness, Kenneth Pierson, admitted that it was Head's duty to secure an MCS-90 and that neither Saunders nor Liberty had any obligation to ascertain that Head or any other motor carrier complied with DOT regulations. States contends that this Court should rule that an MCS-90 was a part of the insurance policy as a matter of law, on the ground that Saunders either knew or should have

known that Head was hauling cattle interstate and that he was supposed to have obtained such an endorsement, and that Saunders' knowledge should be imputed to Liberty for our purposes herein. The Court is unwilling to reach that conclusion.

None of the cases cited by States supports the position she urges here. Moreover, all of the authority cited by plaintiff supports its argument that the motor carrier is responsible for obtaining the required limits of financial responsibility. The Court is not persuaded that the endorsement should have been procured by Saunders or Liberty or that one was in effect by operation of law. The Court finds that under applicable federal law there was no MCS-90 in effect in the instant case.

The Court further finds that the terms of the Arkansas Motor Carrier Act do not provide any coverage for Head under the insurance policy issued by Liberty through Saunders. The evidence adduced at trial established that Head was something less than a "common carrier by motor vehicle" as that term is defined in Arkansas Code Annotated §23-13-203, for he did not undertake to transport property or passengers for the general public. This consideration is important for much the same reason as the existence of the MCS-90, for if Head had been a "common carrier" for the purposes of Arkansas law he would have been required to obtain a motor carrier endorsement. Motor carrier endorsements contain a provision limiting the defenses an insured may raise in response to a claim quite similar to that in the MCS-90. Neither Saunders nor Liberty were subject to the financial responsibility requirements provided in Ar-

kansas law. The Court finds nothing in the applicable Arkansas law which would mandate a result different from that which the Court has reached with respect to federal law.

Inasmuch as the Court has determined that neither an MCS-90 endorsement nor a motor carrier endorsement as required by Arkansas law was in effect with respect to the insurance obtained by Head, Liberty is entitled in this action, and in any others, to rely upon both the provisions in the insurance policy and the rental agreement between Head and Saunders and any defenses which might arise thereunder. Both the policy of insurance (Joint Exhibit 1) and the rental agreement (Joint Exhibit 6) set out the duty on Head's part to provide notice of any traffic accidents involving the leased vehicles and to cooperate with Liberty in the investigation and defense of any claims arising therefrom.

Head has clearly breached the cooperation clause of the rental agreement and the insurance policy, as evidenced by this Court's reinstatement of a default against Head in a related proceeding (case no: LR-C-87-609) on account of his failure to cooperate with counsel and to comply with the rules and orders of the Court. This Court takes judicial notice of its orders entered in case no. LR-C-87-609. Liberty has obviously been prejudiced by Head's failure to cooperate and to give timely notice of claims, for the entry of a default against Head would prevent Liberty from avoiding liability in the event coverage was found. Such acts have been held to release an insurer from liability for damages under the policy which would have otherwise been covered. *See Nation-*

wide Mutual Fire Insurance Company v. Dunkin, 850 F.2d 441 (8th Cir. 1988).

Upon all the foregoing reasons, the Court finds that plaintiff, Liberty Mutual Insurance Company, has no liability to any defendant herein for any damages or losses arising from any traffic accidents involving a vehicle owned or operated by defendant Harvey Hughes or defendant L. P. Head, or any other employee of defendant Head. Judgment in accordance with this Opinion shall be entered forthwith.

DATED this 2nd day of July, 1990.

ELSIJANE T. ROY

United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

Plaintiff

v.

No. H-C-88-20

HARVEY HUGHES AND L. P. HEAD,

PHYLLIS STATES, AS PERSONAL REPRESENTATIVE

OF RANDALL W. STATES, DECEASED AND ELGIN

WAREHOUSE AND EQUIPMENT

Defendants

Judgment

Pursuant to the Memorandum Opinion entered in this matter on this date, it is Considered, Or-

dered and Adjudged that plaintiff, Liberty Mutual Insurance Company, has no liability to any defendant herein for any damages or losses sustained in any traffic accident involving vehicles owned or operated by defendants Harvey Hughes or L. P. Head. Each party shall bear its own costs herein.

DATED this 2nd day of July, 1990.

ELSIJANE T. ROY
United States District Judge

49 U.S.C.A. §§101 and 102

§101. Purpose

(a) The national objectives of general welfare, economic growth and stability, and security of the United States require the development of transportation policies and programs that contribute to providing fast, safe, efficient, and convenient transportation at the lowest cost consistent with those and other national objectives, including the efficient use and conservation of the resources of the United States.

(b) A Department of Transportation is necessary in the public interest and to—

(1) ensure the coordinated and effective administration of the transportation programs of the United States Government;

(2) make easier the development and improvement of coordinated transportation service to be provided by private enterprise to the greatest extent feasible;

(3) encourage cooperation of Federal, State, and local governments, carriers, labor, and other interested persons to achieve transportation objectives;

(4) stimulate technological advances in transportation;

(5) provide general leadership in identifying and solving transportation problems; and

(6) develop and recommend to the President and Congress transportation policies and programs to achieve transportation objectives considering the needs of the public, users, carriers, industry, labor, and national defense.

§102. Department of Transportation

(a) The Department of Transportation is an executive department of the United States Government at the seat of Government.

(b) The head of the Department is the Secretary of Transportation. The Secretary is appointed by the President, by and with the advice and consent of the Senate.

(c) The Department has a Deputy Secretary of Transportation appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary—

(1) shall carry out duties and powers prescribed by the Secretary; and

(2) acts for the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant.

(d) The Department has an Associate Deputy Secretary appointed by the President, by and with the advice

and consent of the Senate. The Associate Deputy Secretary shall carry out powers and duties prescribed by the Secretary.

(e) The Department has 4 Assistant Secretaries and a General Counsel appointed by the President, by and with the advice and consent of the Senate. The Department also has an Assistant Secretary of Transportation for Administration appointed in the competitive service by the Secretary, with the approval of the President. They shall carry out duties and powers prescribed by the Secretary. An Assistant Secretary or the General Counsel, in the order prescribed by the Secretary, acts for the Secretary when the Secretary and the Deputy Secretary are absent or unable to serve, or when the offices of the Secretary and Deputy Secretary are vacant. (Note: The Department shall have a seal that shall be judicially recognized.)

49 C.F.R. §387

§387.1 Purpose and Scope.

This part prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

§387.3 Applicability.

(a) This part applies to for-hire motor carriers operating motor vehicles transporting property in interstate or

foreign commerce.

§387.5 Definitions

As used in this part—*Accident*—includes continuous or repeated exposure to the same conditions resulting in public liability which the insured neither expected nor intended.

Bodily injury—means injury to the body, sickness, or disease including death resulting from any of these.

Cancellation of insurance—the withdrawal of insurance coverage by either the insurer or the insured.

Endorsement—an amendment to an insurance policy.

Environmental restoration—restitution for the loss, damage or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage or potential for damage to human health, the natural environment, fish, shellfish, and wildlife.

Evidence of security—a surety bond or a policy of insurance with the appropriate endorsement attached.

Financial responsibility—the financial reserves (e.g., insurance policies or surety bonds) sufficient to satisfy liability amounts set forth in this part covering public liability.

For-hire carriage—transportation of property by motor vehicle except when—

(1) The property is transported by a person engaged in a business other than transportation; and

(2) The transportation is within the scope of and furthers a primary business (other than transportation) of the person.

In bulk—the transportation, as cargo, of property, except Class A and B explosives and poison gases in containment systems with capacities in excess of 3,500 water gallons.

In bulk (Class A and B explosives)—the transportation, as cargo, of any Class A or B explosive(s) in any quantity.

In bulk (poison gas)—the transportation, as cargo, of any poison gas in any quantity.

Insured and principal—the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

Insurance premium—the monetary sum an insured pays an insurer for acceptance of liability for public liability claims made against the insured.

Motor carrier—a common, contract, or private carrier of property by motor vehicle.

Property damage—means damage to or loss of use of tangible property.

Public liability—liability for bodily injury or property damage and includes liability for environmental restoration.

§387.7 Financial responsibility required.

(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in §387.9 of this part.

(b)(1) Policies of insurance, surety bonds, and endorsements required under this section shall remain in effect continuously until terminated. Cancellation may be effected by the insurer or the insured motor carrier giving 35 days' notice in writing to the other. The 35 days' notice shall commence to run from the date the notice is mailed. Proof of mailing shall be sufficient proof of notice.

(2) *Exception.* Policies of insurance and surety bonds may be obtained for a finite period of time to cover any lapse in continuous compliance.

(c) Policies of insurance and surety bonds required under this section may be replaced by other policies of insurance or surety bonds. The liability of the retiring insurer or surety, as to events after the termination date, shall be considered as having terminated on the effective date of the replacement policy of insurance or surety bond or at the end of the 35 day cancellation period required in paragraph (b) of this section, whichever is sooner.

(d) Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. The proof shall consist of—

(1) "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980" (Form MCS-90) issued by an insurer(s); or

(2) A "Motor Carrier Surety Bond for Public Liability Under Section 30 of the Motor Carrier Act of 1980" (Form MCS-82) issued by a surety.

(e) The proof of minimum levels of financial responsibility required by this section shall be considered

public information and shall be produced for review upon reasonable request by a member of the public.

(f) All vehicles operated within the United States by motor carriers domiciled in a contiguous foreign country, shall have on board the vehicle a legible copy, in English, of the proof of the required financial responsibility (Forms MCS-90 or MCS-82) used by the motor carrier to comply with paragraph (d) of this section.

(g) Any motor vehicle in which there is no evidence of financial responsibility required by paragraph (f) of this section shall be denied entry into the United States.

§387.15 Forms.

Endorsements for policies of insurance (Illustration I) and surety bonds (Illustration II) must be in the form prescribed by the BMCS and approved by the OMB. Endorsements to policies of insurance and surety bonds shall specify that coverage thereunder will remain in effect continuously until terminated, as required in §387.7 of this part. The endorsement and surety bond shall be issued in the exact name of the motor carrier.

ILLUSTRATION I

Form MCS-90 (3/82)

Expiration Date: 06/30/83

Form Approved

OMB No. 2125-0074

ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR
PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CAR-
RIER ACT OF 1980

Issued to _____

Of _____

Dated at _____
This _____ day of _____,
19 _____
Amending Policy No. _____
Effective Date _____
Name of Insurance Company _____
Countersigned by _____
Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "X," for the limits shown:

___ This insurance is primary and the company shall not be liable for amounts in excess of \$ _____ for each accident.

___ This insurance is excess and the company shall not be liable for amounts in excess of \$ _____ for each accident in excess of the underlying limit of \$ _____ for each accident.

Whenever required by the Bureau or the ICC the company agrees to furnish the Bureau or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the Bureau or the ICC to verify that the policy is in force as of a particular date. The telephone number to call is _____.

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice) and (2) if the insured is subject to the ICC's jurisdiction, by

providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, D. C.).

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions which results in bodily injury, property damage, or environmental damage which the insured neither expected or intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property or any combination thereof.

Bodily Injury means injury to the body, sickness or disease to any person, including death resulting from any of these.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage or potential for damage to human health, the natural environment, fish, shellfish, and wildlife.

Property Damage means damage to or loss of use of tangible property.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is

amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration's Bureau of Motor Carrier Safety (Bureau) and the Interstate Commerce Commission (ICC).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions and limitations in the policy to which the endorsement is attached shall remain in full force and effect

as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

The Motor Carrier Act of 1980 requires limits of financial responsibility according to type of carriage and commodity transported by the motor carrier. It is the MOTOR CARRIER'S obligation to obtain the required limits of financial responsibility.

THE SCHEDULE OF LIMITS SHOWN ON THE REVERSE SIDE DOES NOT PROVIDE COVERAGE.

The limits shown in the schedule are for information purposes only.

SCHEDULE OF LIMITS

1. Type of carriage—For-hire (in interstate or foreign

commerce)

Commodity transported—Property (nonhazardous)

July 1, 1981—\$500,000

July 1, 1984—\$750,000

2. Type of carriage—For-hire and private (In interstate, foreign or intrastate commerce.

Commodity Transported—Hazardous substances as defined in 49 CFR 171.8 transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Class A or B explosives, poison gas (Poison A), liquefied compressed gas or compressed gas; or highway route controlled quantity radioactive materials as defined in 49 C.F.R. §173.555.

July 1, 1981—1,000,000

July 1, 1984—5,000,000

3. Type of carriage—For-hire and Private (in interstate or foreign commerce; in any quantity) or (in intrastate commerce; in bulk only)

Commodity transported—Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below.

July 1, 1981—500,000

July 1, 1984—1,000,000

4. Type of carriage—For-hire and Private (In interstate or foreign commerce).

Commodity transported—Any quantity of Class A or B explosives; any quantity of poison gas (Poison A); or highway route controlled quantity radioactive materials as defined in 49 CFR 173.455.

July 1, 1981—1,000,000

July 1, 1984—5,000,000

Note—The type of carriage listed under numbers (1), (2) and (3) apply to vehicles with a gross vehicle weight rating of 10,000 pounds or more. The type of carriage listed under number (4) applies to all vehicles with a gross vehicle weight rating of less than 10,000 pounds.

Note—This table showing the schedule of limits may appear at the bottom or on the reverse side of form MCS-90.

ARKANSAS MOTOR CARRIER ACT OF 1955

(A.C.A. §§23-13-203, 207, 208 and 227)

23-13-203. Definitions.

(a) As used in this subchapter, unless the context otherwise requires:

(8) "contract carrier by motor vehicle" means any person not a common carrier included under subdivision (7) who or which, under individual contracts or agreements, and whether directly or indirectly or by lease of equipment or franchise rights or any other arrangements, transports passengers or property by motor vehicle for compensation.

(9) "Motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle and any person performing for-hire transportation service without authority from the commission.

23-13-205. Interstate commerce unaffected by subchapter.

Nothing in this subchapter shall be construed to interfere with the exercise by agencies of the Government of the United States of its power of regulation of interstate commerce.

23-13-207. Regulation by Arkansas Transportation Commission.

The regulation of the transportation of passengers or property by motor carriers over the public highways of this state, the procurement thereof, and the provisions of facilities therefor is vested in the Arkansas Transportation Commission.

23-13-208. General duties and powers of commission.

It shall be the duty of the Arkansas Transportation Commission:

(1) To regulate common carriers by motor vehicle as provided in this subchapter. To that end, the commission may establish reasonable requirements with respect to continuous and adequate service and transportation of baggage and express. It may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, and safety of operation and equipment which shall conform as nearly as may be consistent with the public interest to the systems of accounts, records, and reports and the requirements as to the preservation of records and safety of operation and equipment now prescribed or which from time to time may be prescribed by the Interstate Commerce Commission for common carriers by motor vehicles engaged in interstate or foreign commerce.

(2) To regulate contract carriers by motor vehicles as prescribed by this subchapter. To that end, the commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, and safety of operation and equipment now prescribed or which may from time to time be prescribed by the Interstate Commerce Commission for contract carriers by motor vehicles engaged in interstate or foreign commerce.

(3) To regulate private carriers, as defined in this subchapter, with respect to safety of their operations and equipment;

(4) To regulate brokers as provided in this subchapter. To that end, the commission may establish reasonable requirements with respect to licensing, financial responsibility, accounts, records, reports, operations, and practices

of any such persons;

(5) For the purpose of carrying out the provisions pertaining to safety, to avail itself of the assistance of any of the several research agencies of the federal government and of any agency of this state having special knowledge of any such matter;

(6) To administer, execute, and enforce all other provisions of this subchapter; to make all necessary orders in connection therewith; and to prescribe rules, regulations, and procedures for such administration;

(7) Upon complaint in writing to the commission by any person, state board, organization, or body politic, the commission shall, or upon its own initiative without complaint, investigate whether any motor carrier or broker has failed to comply with any provisions of this subchapter or with any requirements thereof. If the commission finds upon investigation that the motor carrier or broker has failed to comply therewith, the commission shall issue appropriate order to compel the carrier or broker to comply therewith. Whenever the commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss that complaint.

23-13-227. Certificates and permits—Security for the protection of the public.

(a) No certificate or permit shall be issued to a motor carrier or remain in force unless such carrier complies with such reasonable rules and regulations as the Arkansas Transportation Commission shall prescribe governing the filing and approval of surety bonds, policies of insur-

ance, qualification as a self-insurer or other securities or agreements in such reasonable amount as the commission may require, conditioned to pay, within the amount of the surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against the motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit or for loss or damage to the property of others.

(b)(1) In its discretion and under such rules and regulations as it shall prescribe the commission may require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the commission, to be conditioned upon such carrier making compensation to shippers or consignees for all property belonging to shippers or consignees and coming into the possession of such carriers in connection with its transportation service.

(2) Any carrier which may be required by law to compensate a shipper or consignee for any loss, damage or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights of the shipper or consignee under any such bond, policies, or insurance or other securities or agreements, to the extent of the sum so paid, plus any court costs and reasonable attorney fees paid by such carrier in defending any action brought thereon by such shipper or consignee.

(c) The reasonable rules and regulations of the commission authorized by this section shall conform as nearly

as may be consistent with the public interest to those rules made by the Interstate Commerce Commission from time to time with respect to surety for the protection of the public by motor carriers engaged in interstate or foreign commerce.

(d) Any motor carrier who has qualified as a self-insurer in accordance with the rules and regulations of the Interstate Commerce Commission governing motor carriers engaged in interstate or foreign commerce shall be prima facie deemed qualified as a self-insurer in the State of Arkansas.

(e) In any action against any motor carrier operating under the provisions of this subchapter, whether in law or equity, the insurer, insurance company, or obligor in any policy of insurance or bond given by such carrier in compliance with this section shall not be joined as a party to such suit and shall not be a proper party thereto.

(f) Upon any motor carrier's failure to pay any final judgment rendered against it, the judgment creditor may maintain an action in any court of competent jurisdiction against the insurer, insurance company, or obligor in any policy of insurance, or bond, or obligation, filed under this section, to compel payment of the judgment.

Rule 13.1, Arkansas Transportation Commission

Rule 13.1 Public Liability and Property Damage Endorsement.

All carriers by motor vehicle are required to file public liability and property damage insurance or in lieu thereof, a certificate of insurance on the form ap-

proved by the Commission with minimum liability as set out in the Arkansas Public Liability and Property Damage Endorsement which must be attached. The Endorsement on Public Liability and Property Damage Insurance will be as follows:

ARKANSAS ENDORSEMENT

(Property Damage & Personal Liability)

The policy to which this endorsement is attached is an automobile bodily injury liability and property damage liability policy and is hereby amended to assure compliance by the insured as a motor carrier of passengers or property with Section 15 of Act 397 of 1955, and the pertinent rules and regulations of the Arkansas Transportation Commission.

In consideration of the premium stated in the policy to which this endorsement is attached, the company hereby waives a description of the motor vehicles to be insured hereunder and agrees to pay final judgment for personal injury, including death, resulting therefrom and/or damage to property of other (excluding injury to or death of the insured's employees while engaged in the course of their employment, and loss of or damage to property of the insured and property transported by the insured, designated as cargo) caused by any and all motor vehicles operated by the assured whether listed in the original application or whether it be an additional substitute or emergency vehicle operated under any certificate, license or permit by any order or rules of the Arkansas Transportation Commission within the limits of the schedule hereinafter set out, and further agrees that upon its failure to pay such final judgment, such judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing con-

tained in the policy or any endorsement thereon, nor the violation of any of the provisions, by the assured, shall relieve the company from the liability hereunder or from the payment of such judgment.

The liability of the company shall be the damage sustained to persons or property within the limits of the schedule set out below, except that the insured may file a policy with the limits of the liability greater than the minimum as set out in the schedule.

The liability of the company on each motor vehicle for the following limits shall be a continuing one notwithstanding any recovery hereunder.

Schedule of Minimum Limits

On each motor vehicle used in the transportation of property:

\$25,000.00 for bodily injuries to or death of one person.

\$50,000.00 for bodily injuries to or death of all persons injured or killed in any one accident.

\$5,000.00 for loss or damage in any one accident to property of others.

On each motor vehicle used in the transportation of persons having a seating capacity of twelve passengers or less:

\$25,000.00 for bodily injuries to or death of one person.

\$40,000.00 for bodily injuries to or death of all persons injured or killed in any one accident.

\$5,000.00 for loss or damage in any one accident to property of others.

On each motor vehicle used in the transportation of persons, having a seating capacity of thirteen to twenty passengers inclusive:

\$25,000.00 for bodily injuries to or death of one person.

\$60,000.00 for bodily injuries to or death of all persons injured or killed in any one accident.

\$5,000.00 for loss or damage in any one accident to property of others.

On each motor vehicle used in the transportation of passengers, having a passenger capacity of twenty-one to thirty, inclusive:

\$25,000.00 for bodily injuries to or death of one person.

\$80,000.00 for bodily injuries to or death of all persons injured or killed in any one accident.

\$5,000.00 for loss or damage in any one accident to property of others.

On each motor vehicle used in the transportation of passengers, having a passenger capacity of thirty-one passengers or over:

\$25,000.00 for bodily injuries to or death of one person.

\$100,000.00 for bodily injuries to or death of all persons injured or killed in any one accident.

\$5,000.00 for loss or damage in any one accident to property of others.

On each motor vehicle used to transport hazardous materials:

\$100,000.00 for bodily injuries to or death of 1 person.

— \$300,000.00 for bodily injuries to or death of all persons injured or killed in any one accident.

\$100,000.00 for loss or damage in any one accident to the property of others.

On each vehicle used to transport hazardous waste:

\$100,000.00 for bodily injury to or death of one per-

son.

\$300,000.00 for bodily injury to or death of all persons injured or killed in any one accident.

\$1,000,000.00 for loss or damage in any one accident to the property of others.

The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect until after THIRTY (30) DAYS notice in writing, by the company, shall have first been given to said Commission, said THIRTY (30) DAYS notice to commence to run from the date notice is actually received by the Commission.

Attached to and forming a part of Policy No. ____ issued by _____ Insurance Company this the ____ day of _____, 19 ____

Arkansas Resident Agent

Cargo Endorsement

All common carriers of property by motor vehicle are required to file Cargo Insurance with minimum liability of \$1,000.00 with Cargo Endorsement attached. The endorsement on Cargo Insurance shall be as follows:

Arkansas Cargo Insurance Endorsement

The policy to which this endorsement is attached is a cargo insurance policy and is hereby amended to assure compliance by the assured, as a common carrier of property by motor vehicle, with Section 15, Act 397 of the Acts of Arkansas of 1955 with reference to making compensation to shippers or consignees of all property belonging to shippers or consignees coming into the possession of such carrier in connection with its transportation service, and with the pertinent rules and regulations of the Arkansas Transportation Commission.

In consideration of the premium stated in the policy

to which this endorsement is attached, the issuing company hereby agrees to pay, within the limits of the liability hereinafter provided, any shipper or consignee, for all loss, or damage to all property belonging to such shipper or consignee and coming into the possession of the assured in connection with the transportation service for which loss or damage the insured may be legally liable, regardless of whether the motor vehicle, terminal, warehouse, and other facilities used in connection with the transportation of the property hereby insured, are specifically described in the policy or not. The liability of the company extends to such loss or damage, whether occurring on the route, or in the territory authorized to be served by the insured, or elsewhere within the boundaries of the State of Arkansas.

Within the limits of liability hereunder provided, it is further understood or agreed that no condition, provision, stipulation or limitation contained in the policy, or any other endorsement thereon, or violation thereof, of this endorsement by the insured shall affect in any way the right of any shipper, or consignee, or relieve the company from liability for the payment of any claim for which the insured may be held legally liable to compensate shipper or consignee, irrespective of the responsibility, or lack thereof, or insolvency or bankruptcy of the insured. However, all terms, conditions and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any loss or damage involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of

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this policy, except for the agreement contained in this endorsement.

The liability of the company for the limits provided in this endorsement shall be a continuing one, notwithstanding any recovery hereunder.

The company shall not be liable for an amount in excess of the maximum shown in the policy (in no event to be less than \$1,000.00) in respect to any loss or damage to, or aggregate of loss or damage of, or to the property herein insured accruing at any time or place, or to loss or damage in such property carried in any one motor vehicle, whether or not such loss or damage occurred while such property is on vehicle or otherwise. The minimum liability assumed under this endorsement shall be One Thousand (\$1,000.00) Dollars.

This endorsement may not be canceled without the cancellation of the policy to which it is attached.

The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect until after thirty (30) days notice in writing by the company, shall have first been given to said Commission, said thirty (30) days notice to commence to run from the date notice is actually received by the Commission.

Attached to and forming a part of Policy No. _____
issued by the _____ Insurance
Company this the ____ day of _____, 19 ____.

